

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAMUEL LOVE,
Plaintiff
v.
BIUON INC.,
Defendant

Case No. 19-cv-00987-AGT

**ORDER ON (I) CROSS MOTIONS FOR
SUMMARY JUDGMENT (II) MOTION
FOR LEAVE TO AMEND THE
COMPLAINT**

Re: Dkt. Nos. 48, 54, 59

The summary-judgment record, as supplemented by oral argument, reveals that Samuel Love's ADA claim is moot. Love identified one—and only one—discriminatory barrier to access in his complaint. He alleged that when he visited the defendant's gas station, he found parking spaces for customers, but none that were wheelchair accessible. Subsequent discovery revealed that the gas station no longer offers *any* public parking, neither for wheelchair- nor non-wheelchair-using customers. Love's own expert admits this. *See* Nnaji Rpt., ECF No. 48-8 at 7 (“There are a total of 0 parking stalls in the parking lot that could be reasonably associated with this facility.”). And Love doesn't disagree. He maintains that the gas station offered public parking when he visited but concedes that it no longer does. *See* ECF No. 56, FTR Tr. 01:45 to 03:15.

ADA regulations don't require businesses to provide wheelchair-accessible parking if they don't offer public parking at all. *See* 36 C.F.R. Pt. 1191, App. B § 208.2. Which means that the current parking set up at the gas station, or rather the lack of one, doesn't violate the ADA. Also, even if the gas station once offered public parking (a point the defendant doesn't concede), Love cannot base his ADA claim on that prior conduct. The ADA permits private plaintiffs to sue only for injunctive relief. *See Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011). And a "request for injunctive relief remains live only so long as there is some present harm left to

1 enjoin.” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017) (simplified); *see*
2 *also Oliver*, 654 F.3d at 905 (explaining that “a defendant’s voluntary removal of alleged barriers
3 prior to trial can have the effect of moot[ing] a plaintiff’s ADA claim”). Concerning parking, Love
4 hasn’t identified a present harm to enjoin.

5 At the summary-judgment hearing, Love insisted that his ADA claim wasn’t moot because
6 he still couldn’t access the gas station’s convenience store. He referred to the gas station and its
7 facilities as an “island of inaccessibility,” and he identified other, non-parking-related barriers on
8 the property, including the lack of a wheelchair-accessible route from the street to the convenience
9 store. *See* FTR Tr. 03:55 to 04:15, 13:04 to 13:40. Love cannot base his ADA claim on barriers
10 he didn’t identify in his complaint. Precedent is clear on this point. “[A] plaintiff must identify
11 the barriers that constitute the grounds for a claim of discrimination under the ADA in the
12 complaint itself.” *Oliver*, 654 F.3d at 909.

13 Love, at the hearing, continued by noting that he did flag the additional barriers,
14 mentioning them in an expert report that he served on the defendant during discovery. *See* FTR
15 Tr. 23:27 to 24:15; *see also* ECF Nos. 39 at 5, 48-8. The problem is that Love didn’t amend his
16 complaint to formally include any of these barriers. The defendant, then, “would have had to
17 guess which of the items listed in the expert report were grounds for [Love’s] claim.” *Oliver*, 654
18 F.3d at 909. *Oliver* addressed the exact same issue; and there, the Ninth Circuit held that on
19 summary judgment the district court properly “refus[ed] to consider the barriers that [the plaintiff]
20 identified only in his expert report.” *Id.* For those barriers, notice was inadequate.

21 Sensing the problem, Love has moved for leave to amend his complaint, hoping to add
22 allegations about the barriers his expert identified. *See* ECF No. 59. The case deadline to amend
23 the complaint passed last June. *See* ECF No. 42. When, as here, a pretrial scheduling order
24 established a deadline for amending the pleadings, and that deadline has expired, the plaintiff must
25 demonstrate that he missed the deadline despite diligent efforts to comply with it. *See Coleman v.*
26 *Quaker Oats Co.*, 232 F.3d 1271, 1294–95 (9th Cir. 2000). Love hasn’t met this burden. His
27 expert completed a site inspection three months before the deadline to amend, *see* ECF No. 48-8 at
28 14, but the deadline came and went without Love taking action. He “concedes undue delay.” ECF

1 No. 59-1 at 5. “[C]arelessness is not compatible with a finding of diligence and offers no reason
2 for a grant of relief” to file a “belated motion to amend.” *Johnson v. Mammoth Recreations, Inc.*,
3 975 F.2d 604, 609 (9th Cir. 1992); *see also Coleman*, 232 F.3d at 1295 (“Because [plaintiffs] have
4 failed to show diligence, the inquiry should end.”) (simplified). Love’s untimely request for leave
5 to amend is denied.

6 As parking is no longer at issue and no other barriers were timely identified, no relief
7 under the ADA is available for Love. The Court accordingly grants the defendant’s—and denies
8 Love’s—motion for summary judgment. Having dismissed the only federal claim prior to trial,
9 the Court declines to exercise supplemental jurisdiction over the remaining state-law claim. *See*
10 28 U.S.C. § 1337(c)(3).

11 **IT IS SO ORDERED.**

12 Dated: March 5, 2021

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15 ALEX G. TSE
16 United States Magistrate Judge
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